United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

27

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 24,097

UNITED STATES OF AMERICA,

Appellee,

v.

LYNWOOD LONG,

Appellant.

Appeal from the United States District Court
for the District of Columbia Circuit

BRIEF FOR APPELLANT AND APPENDIX

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Fourth Amendment to the Constitution of the United States

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. ..... App. 8

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*Cases chiefly relied on.

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BRIEF FOR APPELLANT

STATEMENT OF ISSUES PRESENTED*

I. Was the trial court correct in finding that the affidavit in support of the search warrant in this case was sufficient to constitute probable cause for the search and seizure carried out by the FBI?

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*This case has not previously been before this Court.

JURISDICTION STATEMENT

The jurisdiction of this Court is founded on 28 U.S.C. 1291.

REFERENCE TO RULINGS

References are to Appendix pages and designated "App. "

1. December 15, 1969, Memorandum and Order Denying the Appellant's Motion to Suppress. Signed December 12, 1969, Filed December 15, 1969. (App. 8)

STATUTES INVOLVED

18 U.S.C. 1952 - Interstate and foreign travel or transportation in aid of Racketerring enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to–

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carry on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both. ***

22 D.C.C. 1501—Lotteries—Promotion—Sale or possession of tickets.

If any person shall within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting, or advertising, directly or indirectly, any policy lottery, policy shop, or any lottery, or shall sell or transfer any chance, right, or interest, tangible or intangible, in any policy lottery, or any lottery or shall sell or transfer any ticket, certificate, bill, token, or other device, purporting or intended to guarantee or assure to any person or entitle him to a chance of drawing or obtaining a prize to be drawn in any lottery, or in a game or device commonly known as policy lottery or policy or shall, for himself or another person, sell or transfer, or have in his possession for the purpose of sale or transfer, a chance or ticket in or share of a ticket in any lottery or any such bill, certificate, token, or other device, he shall be fined upon conviction of each said offense not more than $1,000 or be imprisoned not more than three years, or both. The possession of any copy or record of any such chance, right, or interest, or of any such ticket, certificate, bill, token, or other device shall be prima-facie evidence that the possessor of such copy or record did, at the time and place of such possession, keep, set up, or promote, or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or advertising a policy lottery, policy shop, or lottery.

22 D.C.C. 1502—Possession of lottery or policy tickets.

If any person shall, within the District of Columbia, knowingly have in his possession or under the control, any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing, current or not current used or to be used in violating the provisions of section 22-1501, 22-1504, or 22-1508, he shall, upon conviction of each such offense, be fined not more than $1,000 or be imprisoned for not more than one year, or both. For the purpose of this section,

possession of any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing shall be presumed to be knowing possession thereof.

22 D.C.C. 1505–Gambling premises

* * *

(b) It shall be unlawful for any person in the District of Columbia knowingly, as owner, lessee, agent, employee, operator, occupant, or otherwise, to maintain or aid or permit the maintaining of any gambling premises.***

* * *

(d) Whoever violates this section shall be imprisoned not more than one year or fined not more than $1,000, or both, unless the violation occurs after he has been convicted of a violation of this section in which case he may be imprisioned for not more than five years, or fined not more than $2,000, or both.

STATEMENT OF THE CASE

The Appellant Lynwood Long was indicted in a four count indictment charging:

1. That he travelled in Interstate Commerce from the State of Maryland to the District of Columbia with intent to engage in the operation of a lottery, known as the numbers game.

2. That from August 15, 1969 to September 12, 1969 he was engaged in promoting a lottery known as the numbers game.

3. That on September 12, 1969, he did have in his possession papers and writing used and to be used in a lottery known as the numbers game.

4. That on September 12, 1969, he did maintain and permit maintaining of a gambling premises located at 2338 24th Street, S.E., Washington, D.C.

The Appellant filed a Motion to Suppress the Evidence seized on September 12, 1969, from the premises 2338 24th Street, S.E., Apt. 1604, Washington, D. C., pursuant to a search warrant issued on September 11, 1969, by a United States Magistrate. This Motion to Suppress was not argued preliminarily but with the consent of the Appellant and the Government, was argued at time of trial. The Appellant in open Court signed a waiver of trial by jury. The trial then proceeded without any witnesses and by stipulation of the Government and counsel for the Appellant it was agreed that the Motion to Suppress was the only defense to be offered by the Appellant and that if the Court granted the Motion to Suppress the Appellant would be found not guilty and if the Motion to Suppress was denied that the appellant would be found guilty. The factual presentation to the Court consisted entirely of the affidavit in support of the search warrant and the facts stated therein in considering the legal arguments were accepted as being true. The affidavit sworn to by the F.B.I. Agent, Bernard A. De Santis, on September 11, 1969, to summarize, contained the following:

That the F.B.I. on August 6, 1969, had received information from an informer who had proved reliable before, that Lynwood Long was operating a lottery known as the numbers game at a Washington address, strictly by telephone. That the address was 2338 24th Street, S.E., Apt. 1604, Washington, D. C. That said apartment was being let by one R. J. Cecchini, who had a conviction on a prior occasion, somewhere else, for gambling. That on several occasions between August 15, 1969 and September 12, 1969, observations were made by the FBI wherein Long was seen in Maryland and that he did go to the address in Washington mentioned by the informant, park his car and go in.

Another confidential informant advised on September 9, 1969, that he had personal knowledge that Lynwood "Shorty" Long had

worked in numbers offices in the local area for many years and was currently working in a numbers office, location unknown.

Furthermore, the F.B.I. had had information that Long, in February 1966, had been working in a bookmaking office in an apartment located at 1700 Irving Street, N.W., Washington, D.C. Later in February 1966, informant told the F.B.I. that Long was moving to Maryland. F.B.I. subsequently verified that the said operation did move to Maryland. There was no averment in the Affidavit that Long had ever been convicted or even arrested for gambling prior to this. At time of sentence it was shown by the probation report that Long had never been arrested or convicted of any gambling charge prior to this case.

Pursuant to this search warrant the premises at 2338 24th Street, S.E., Washington, D. C. were searched on September 12, 1969, and certain gambling paraphernalia was taken therefrom.

The Court after hearing argument on the Motion to Suppress took the case under advisement on December 2, 1969. On December 15, 1969, the Court filed a Memorandum and Order denying the Defendant's Motion to Suppress. The Court found the Appellant guilty and sentenced him to a prison term of 18 months to 54 months.

ARGUMENT

APPELLANT'S CONVICTION SHOULD BE REVERSED SINCE THE COURT SHOULD HAVE GRANTED A MOTION TO SUPPRESS AND FOUND THE APPELLANT NOT GUILTY.

I.

The complete test laid down by the Supreme Court for the sufficiency of affidavits in support of search warrants has not been met in this case.

In *Aguilar* vs. *Texas*, 378 U.S. 108, 12 L.Ed. 2d 723, 84 SCT 1509 (1964), the Supreme Court enunciated a two-pronged test which has to be met before an affidavit will be declared sufficient to constitute probable cause for a search and seizure. First, the affiant–officers must *support* their claim that the informant was "credible" or his information "reliable". Secondly, the application must set forth the "underlying circumstances" necessary to enable the magistrate independently to judge the validity of the informant's conclusion that criminal activity was being carried on.

For the purposes of this argument, it will be conceded that the first test, i.e. the "reliability" of the informants was met by the affidavit's allegations that "on numerous occasions in the past", information furnished by the informants had been verified as correct "either through independent sources or Federal Bureau of Investigation observations or has resulted in arrest," (page 2 of affidavit).

The test is, however, a dual one. Two conditions have to be met. In the case at bar, only the first hurdle has been passed by the government.

II.

Even assuming that the "reliability" test has been met in this case, the second test, i.e. whether the affidavit sufficiently stated the underlying circumstances upon which the informant based his conclusions, has not been met.

The Supreme Court further delineated the principles of *Aguilar* in *Spinelli* vs. *United States*, 393 U.S. 410, 21 L.Ed. 2d 637, 89 SCT 584 (1969). In a factual situation very much like the one under consideration here, the affidavit in *Spinelli* stated that the FBI "had been informed by a confidential, reliable informant that William Spinelli is operating a handbook and accepting wagers and disseminating wagering information by means of the telephones . . .". The

Court criticized the affidavit because although "the affiant swore that his confidant was 'reliable', he offered the magistrate no reason in support of this conclusion". But then the Court went on to say:

> *"Perhaps even more important* is the fact that Aguilar's other test has not been satisfied. The tip does not contain a sufficient statement of the underlying circumstances from which the informer concluded that Spinelli was running a bookmaking operation. We are not told how the FBI's source received his information—it is not alleged that the informant personally observed Spinelli at work or that he had ever placed a bet with him. Moreover, if the informant came by the information indirectly, he did not explain why *his* sources were reliable." *Spinelli* v. *United States*, supra, at 415 (Emphasis added).

The only distinction, in this respect, between the affidavit in this case and the affidavit in *Spinelli* is the addition of the phrase "personal knowledge". We are told (on page 1 of the Affidavit) that the confidential informant had "personal knowledge" that a bookmaking office was being operated on the subject premises. But the mere addition of this phrase does not cure the inherent defect in this affidavit caused by the failure to tell the magistrate how the FBI's source received his information.

The fact that the informants had "personal knowledge"only means, within the rule quoted above from *Spinelli*, that they do not have to explain why *their own* sources were reliable, since they got the information first hand, rather than indirectly. But the very fact that the informants do allege "personal knowledge" cries out for "the other shoe to drop". What is the *source* of that knowledge? Did the informant personally place a bet? Did he actually see the handbook operation? What are the facts, the Court is asking, upon which you base your personal knowledge?

The affidavit fails to meet, therefore, the "even more important" test of a clear statement of the underlying circumstances upon which the informant based his allegations of "personal knowledge".

III.

In the alternative, the affidavit fails in that the informant did not describe the accused's criminal activity in sufficient detail to show the magistrate that he is relying on something more substantial than rumor.

The Supreme Court provided in *Spinelli* a seeming alternative to a statement detailing the manner in which the information was gathered:

> ". . . it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." *Spinelli* vs. *United States*, supra, at 416.

The Court cited *Draper* vs. *United States*, 358 U.S. 307, 3 L.Ed. 2d 327, 79 SCT 329 (1959), as an example of the type of "particularity" of detail it is seeking. In that case, which the Court calls a "suitable benchmark", the informant told the federal agent that the accused would be returning from Chicago to Denver on a certain train carrying with him narcotics and that the accused:

> ". . . was a Negro of light brown complexion, 27 years of age, 5 feet 8 inches tall, weighed about 160 pounds, and that he was wearing a light colored raincoat, brown slacks and black shoes." *Draper* v. *United States*, supra, at 309, note 2.

The informant in *Draper* also told the federal agent that the accused would be carrying "a tan zipper bag", and that he habitually "walked real fast".

The trial court also cites *Draper*, but then suggests that the mere statement that "the defendant was going to move the bookmaking operation to Maryland," was a sufficiently detailed description of the accused's criminal activity to satisfy the test of *Spinelli* and *Draper*, (page 4 of *Memorandum and Order).* If any statement was ever simply "a casual rumor circulating in the underworld", this one certainly is. A magistrate, when confronted with such an absence of detail, could not reasonably infer that the informant had gained his information in a reliable manner.

IV.

Viewed in the entirety, the affidavit falls short of the standards of probable cause enunciated by the Supreme Court in its decisions in this field.

In those cases where the Supreme Court has determined that probable cause was established, there was a "much more substantial" showing than the one made in *Spinelli;* note 7, 393 US 418. The two cases particularly noted by the Court in *Spinelli* were *United States* vs. *Ventresca*, 380 U.S. 102, 13 L.Ed. 2d 684, 85 SCT 741 (1965) and *McCray* vs. *Illinois*, 386 US 300, 18 L.Ed. 2d 62, 87 SCT 1056 (1967).

The observations made by the federal agents in *Ventresca* were substantially greater than the mere coming and going of the suspects. Ventresca was suspected of operating an illegal distillery. Agents observed the delivery on four occasions of 60-pound bags of sugar and empty five-gallon cans. They observed large numbers of filled five-gallon cans being carried from the suspect's home and smelled the odor of fermenting mash as they walked along the sidewalk in front of his house. They also heard "certain metallic noises" and "sounds similar to that of a motor or a pump coming from the direction of Ventresca's house;" 380 U.S. 103, 104.

And in *McCray*, the arresting officers in a narcotics case were told by an informant that the accused was selling narcotics and had narcotics in his possession "and that he could be found in the vicinity of 47th and Calumet at this particular time." 386 US 300, 302. The informant pointed out the accused who was wearing three coats and who after seeing the police car hurriedly walked between two buildings.

The appellant contends that the showing of probable cause in this case is clearly closer to that which was rejected in *Spinelli* rather than the strong showing made in *Ventresca* and *McCray*. Justice Harlan, writing for the majority in *Spinelli*, while recognizing that the magistrate is obligated to render a judgment based upon a common-sense reading of the entire affidavit, went on to state that:

> "We believe, however, that the 'totality of circumstances' approach taken by the Court of appeals paints with too broad a brush." 393 U.S. 410, 415.

The trial court's denial of the motion to suppress is based primarily on the government's claim that the informant's tip gives a "suspicious color" to the FBI's reports describing the appellant's innocent-seeming conduct. The trial court concedes that the movements of appellant were "insufficient in themselves to support a finding of probable cause", (page 4, *Memorandum and Order)*, but describes them as providing "some additional corroboration". This is just the "totality of circumstances" approach which was rejected by the Supreme Court in *Spinelli.*

Perhaps the most important lesson that *Spinelli* teaches is where the informant's tip is a necessary element in a finding of probable cause, its proper weight must be determined by a very "precise analysis". When such an analysis is applied to this case, it will be seen that observations of completely innocent conduct—insufficient in themselves to support a finding of probable cause—are being used to

bolster a tip that fails to state the underlying circumstances upon which it is founded and which does not include a sufficiently detailed description of the accused's criminal activity.

Whether the affidavit is viewed in its entirety or each of its allegations are separately analyzed, it is clear that it fails to conform to the standards of probable cause established by the Supreme Court.

CONCLUSION

For the reasons cited, the judgment of conviction should be reversed by this Court and an acquittal entered.

Respectfully submitted,

H. CLIFFORD ALLDER
666 11th Street, N.W.
Washington, D. C. 20001
Counsel for Appellant

INDEX TO APPENDIX

INDICTMENT

The Grand Jury charges:

FIRST COUNT:

Commencing on or about August 15, 1969, and continuing until about September 12, 1969, the defendant, Lynwood Long, did travel in interstate commerce from the State of Maryland to the District of Columbia, with intent to distribute the proceeds of, and to otherwise promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of an unlawful activity; that is, that he, the defendant, Lynwood Long, did keep, set up, and promote, and was concerned as owner, agent, and clerk, and in other manner, in managing, carrying on and promoting, directly and indirectly, a lottery known as the numbers game, in violation of Title 18 United States Code, Section 1952.

SECOND COUNT:

Continuously during the period from about August 15, 1969, to about September 12, 1969, within the District of Columbia Lynwood Long was concerned as owner, agent, and clerk, and in other manners in managing, carrying on and promoting a lottery known as the numbers game.

THIRD COUNT:

On or about September 12, 1969, within the District of Columbia, Lynwood Long knowingly had in his possession and under his control, notations, records, receipts, tickets, certificates, bills, slips, tokens, papers and writing, current and not current, used and to be used in a lottery known as the numbers game.

FOURTH COUNT:

On or about September 12, 1969, within the District of Columbia, Lynwood Long did knowingly, as lessee, agent, operator and occupant, maintain, aid and permit the maintaining of a gambling premises located at 2338 - 24th Street, Southeast, Washington, D.C.

Attorney of the United States in and
for the District of Columbia

A True Bill:

Foreman

AFFIDAVIT IN SUPPORT OF WARRANT

Affidavit in support of an application for a United States Magistrate's arrest warrant for violation of Title 18, Section 1952, United States Code; and Title 22, Section 1501 and 1502, District of Columbia Code for Lynwood "Shorty" Long; and in support of a United States Magistrate's search warrant for the premise located at Apartment Number 1604, 2338 24th Street, S.E., Washington, D.C., which apartment bears the name of R. J. Cecchini on the door.

Statement of Facts

Information was received on February 3, 1966, from a confidential informant that he had personal knowledge that a bookmaking office was being operated from an apartment located at 1700 Irving Street, N.W., Washington, D.C. Informant advised that there were at least two individuals working in this office.

On February 23, 1966, this same confidential informant advised that he had ascertained that Lynwood "Shorty" Long was one of the individuals working in this bookmaking office. This informant

also advised at the time that he had ascertained that Long and the other individual or individuals working in the above bookmaking office were going to move their operation into the State of Maryland in the very near future.

The fact that the above bookmaking office was moved from Washington, D.C. to Prince Georges County, Maryland, was subsequently verified by investigation conducted by the Federal Bureau of Investigation.

Information was received on August 6, 1969, from this same confidential informant that he has personal knowledge that Lynwood "Shorty" Long, who resides in nearby Maryland, is now conducting a numbers operation at the residence of Russ Cecchini in Washington, D.C. strictly by telephone.

The above confidential informant is well acquainted with gambling activities in the Washington, D. C. area and on numerous occasions in the past has furnished information that has been verified as correct either through independent sources or Federal Bureau of Investigation observations or has resulted in arrests.

Another confidential informant advised on September 9, 1969, he has personal knowledge that Lynwood "Shorty" Long has worked in numbers offices in the local area for many years and is currently working in a numbers office, location unknown. This latter confidential informant is also well acquainted with gambling activities in the Washington, D. C. area and has furnished information on numerous occasions in the past that was either verified as correct through independent sources or Federal Bureau of Investigation observations.

According to the records of the Metropolitan Police Department, Russell Joseph Cecchini, 2338 24th Street, S. E., Washington, D.C., was arrested on September 17, 1968, on charges of operating a lottery, maintaining a gambling premise, and possession of numbers slips. On the latter two charges, a judgment of guilty was entered.

Observations

At approximately 11:20 a.m., August 15, 1969, Special Agents Bernard A. De Santis and Edward N. Wills observed an automobile belonging to Lynwood "Shorty" Long, which is a 1964 Mercury Sedan bearing District of Columbia license 556-391, parked in front of a house located at 5231 Devonshire Drive, Oxon Hill, Maryland.

At approximately 8:30 a.m., August 26, 1969, Special Agent De Santis observed Long's car parked in front of the above Oxon Hill, Maryland, address. At 2:00 p.m., August 26, 1969, Special Agent De Santis observed Long's vehicle parked in front of 2338 24th Street, S.E., Washington, D. C.

At approximately 8:15 a.m., August 27, 1969, Special Agent De Santis observed Long's automobile parked in front of the above Oxon Hill, Maryland, address. At approximately 2:55 p.m., August 27, 1969, Special Agent De Santis observed Long's automobile parked in front of 2338 24th Street, S.E., Washington, D. C.

At approximately 10:00 a.m., September 2, 1969, Special Agents Dean S. Haney and De Santis observed Long leaving the residence at 5231 Devonshire Drive, Oxon Hill, Maryland, enter his automobile and drive away.

At approximately 11:15 a.m., September 2, 1969, Special Agents Haney and De Santis observed Long's automobile parked in front of 2338 24th Street, S.E., Washington, D. C.

At approximately 1:23 p.m., September 3, 1969, Special Agent De Santis observed Long's automobile parked in the vicinity of 2338 24th Street, S.E., Washington, D. C. At approximately 11:55 p.m., September 3, 1969 Special Agent De Santis observed Long's automobile parked in front of the above mentioned Oxon Hill, Maryland, address.

At approximately 10:02 a.m., September 4, 1969, Special Agent John J. O'Donnell observed Long depart from the residence located at 5231 Devonshire Drive, Oxon Hill, Maryland, enter his automobile and drive away.

At approximately 11:37 a.m., September 4, 1969, Special Agents O'Donnell and Thomas K. Sullivan observed Long's car parked in the 2300 block of 24th Street, S.E., Washington, D. C.

At approximately 7:10 p.m., Special Agents De Santis and Haney observed Long leaving 2338 24th Street, S.E., Washington, D. C., enter his car and drive away.

At 7:44 p.m., September 4, 1969, Special Agents De Santis and Haney observed Long park his automobile in front of the above mentioned Oxon Hill address and enter the residence.

At approximately 11:00 a.m., September 8, 1969, Special Agents De Santis and Haney observed Long leaving the above mentioned Oxon Hill, Maryland, address, enter his automobile and drive away. At approximately 11:40 a.m., September 8, 1969, Special Agents De Santis and Haney observed Long parking his automobile in the 2300 block of 24th Street, S.E., Washington, D. C., and immediately thereafter enter the apartment building located at 2338 24th Street, S.E., Washington, D. C. At the time Long entered this building it was observed that he looked around in various directions to see if anyone was watching him.

At approximately 7:00 p.m., September 8, 1969, Special Agents De Santis and Haney observed Long leaving 2338 24th Street, S.E., Washington, D. C., enter his automobile and drive away.

At 7:18 p.m., September 8, 1969, Special Agents De Santis and Haney observed Long entering the residence located at 5231 Devonshire Drive, Oxon Hill, Maryland.

At approximately 10:22 a.m., September 9, 1969, Special

Agents De Santis and Haney observed Long leaving the above mentioned Oxon Hill, Maryland, address, enter his car and drive away.

At approximately 11:56 a.m., September 9, 1969, Special Agent Robert E. McKenna observed Long parking his automobile in the 2300 block of 24th Street, S.E., Washington, D. C.

At approximately 11:58 a.m., September 9, 1969, Special Agent McKenna observed Long entering Apartment Number 1604, 2338 24th Street, S.E., Washington, D. C. At the time Long entered this apartment building it was observed that he looked around in several directions to see if he was being watched.

Special Agent De Santis observed Long's automobile still parked in the 2300 block of 24th Street, S.E., Washington, D. C., as late as 3:30 p.m., September 9, 1969.

At approximately 11:06 a.m., September 10, 1969, Special Agents Robert E. Taylor and McKenna observed Long in his vehicle leaving the area of the 5200 block of Devonshire Drive, Oxon Hill, Maryland.

At approximately 11:45 a.m., September 10, 1969, Special Agent Elmer W. Rawls, Jr., observed Long park his car in the 2300 block of 24th Street, S.E., Washington, D. C., and then enter the residence at 2338 24th Street, S.E., Washington, D. C.

Based on the reliability of the information received, the observations made, the time of day that the above activity was carried out and the knowledge and training of the Special Agents as to the methods employed by persons engaged in a numbers operation, it is the firm belief of the Special Agents that Lynwood "Shorty" Long is now actively engaged in conducting a numbers operation.

It is further believed that there is being concealed in the premise located at Apartment Number 1604, 2338 24th Street, S.E., Washington, D. C., numbers, betting slips, records and related gambling

paraphernalia used in conducting this numbers operation and that the above mentioned premise is now being used as an office for this numbers operation, in violation of the provisions of Title 18, Section 1952, United States Code; and Title 22, Section 1501 and 1502, District of Columbia Code.

/s/ Bernard A. De Santis
Special Agent
Federal Bureau of Investigation

Subscribed and sworn to before me this 11th day of September, 1969

/s/ John F. Doyle
United States Magistrate for the District of Columbia

MOTION TO SUPPRESS

This Defendant, Lynwood Long, moves this Court to direct that certain property which was taken from the premises 2338 - 24th Street, Southeast, Washington, D. C., on September 12, 1969, by members of the Metropolitan Police Department be suppressed as evidence against him in any criminal proceeding.

The Defendant states that there was not probable cause for the said search warrant and therefore the search and seizure of the said premises was unlawful.

WHEREFORE, the Defendant requests that the evidence taken from said premises be suppressed as evidence against him at any criminal proceeding.

/s/ H. Clifford Allder
Attorney for Defendant

POINTS AND AUTHORITIES

1. The Fourth Amendment to the Constitution of the United States.

2. The following cases:

Henry vs. United States - 4 L Ed. 2nd 134; 361 U.S. 98

United States vs. DiRe - 92 L Ed. 210; 332 U.S. 581

Giordenello vs. United States - 2 L Ed. 2nd; 357 U.S. 480

Wong Sun vs. United States - 371 U.S. 471

Aguilar vs. Texas - 12 L Ed. 2nd 732

United States vs. Ventresca - 380 U.S. 102

/s/ H. Clifford Allder
Attorney for Defendant

[Certificate of Mailing Omitted in Printing]

MEMORANDUM AND ORDER

This matter is before the Court on defendant's motion to suppress certain property which was taken from the premises 2338 24th Street, S. E., Washington, D. C., by members of the Metropolitan Police Department in execution of a search warrant on September 12, 1969. The motion was heard on December 2, 1969, and and taken under advisement.

Defendant contends that probable cause was lacking for the search warrant, and therefore the search and seizure was illegal. Defendant relies primarily on *Spinelli v. United States*, 393 U.S. 410 (1969) and *Aguilar v. Texas*, 378 U. S. 108 (1964). The Government, in support of its position, also relies on *Spinelli*.

The legality of the search in the case at bar depends upon the sufficiency of the affidavit filed in support of an application for a United States Magistrate's search warrant. The issue, therefore, is whether or not the affidavit presents sufficient information for a finding of probable cause.

In *Aguilar v. Texas, supra,* the Supreme Court set forth a two-pronged test to apply in judging the sufficiency of an application for a search warrant in which use is made of a confidential informant. First, the affidavit must set forth some of the underlying circumstances from which the informant concluded that the articles to be seized were where he claimed they were; and second, "some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see *Rugendorf v. United States,* 376 U. S. 528, was 'credible' or his information 'reliable. ". *Aguilar, supra,* at 114. In applying this test, *Aguilar* makes clear that where a search warrant is involved, based upon a magistrate's determination of probable cause rather than that of a police officer engaged in the "often competitive enterprise of ferreting out crime," *Johnson v. U. S.,* 333 U. S. 10, "the reviewing courts will accept evidence of a less 'judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant.' " *Aguilar, supra,* at 111, citing *Jones v. U. S.,* 362 U. S. 257.

With the above principles in mind, the Court now turns to the affidavit in the present case. In substance, the affidavit alleges that information was received from a confidential informant in February of 1966 that he had personal knowledge that a bookmaking office was being operated from an apartment on Irving Street by at least two individuals, one of whom was the defendant in this case. The informant also provided information that the individuals were going to move their operation into the State of Maryland in the very near

future. The move was later verified by an investigation conducted by the F.B.I. The same informant also related in August of 1969 that he had personal knowledge that the defendant, who resided in nearby Maryland, was currently conducting a numbers operation at the residence of Russ Cecchini in Washington, D. C., by telephone. The records of the Metropolitan Police Department disclosed that Russell Joseph Cecchini was arrested in September of 1968 on numbers violations, and was convicted. Information was also received from a second confidential informant in September of 1969, who stated that he had personal knowledge that the defendant was currently working in a numbers office. The affidavit further alleges that both informants had given information on numerous occasions in the past that had been verified as correct either through independent sources, F.B.I. observations, or had resulted in arrests.

The remainder of the affidavit consists of observations by agents of the F. B. I. relating to movements by the defendant between his Maryland address and the alleged bookmaking establishment in Washington.

Turning to the two tests set forth in *Aguilar*, *supra*, and further expounded in *Spinelli*, *supra*, the Court will first consider the test relating to the underlying circumstances upon which the finding of reliability of the informants is based. Since the affidavit stated that both informants had provided information on numerous occasions in the past that had been verified as correct, either through independent sources or F.B.I. observations or had resulted in arrests, the Court is of the opinion that the affidavit meets the reliability tests.

At oral argument, defendant contended primarily that the affidavit failed to meet Aguilar's other test relating to the underlying circumstances from which the informants concluded that the defendant was conducting a bookmaking operation. The purpose of this test is "so that the magistrate may know that he is relying on some-

thing more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation." *Spinelli*, supra, at 416. The fear that the informant might be relying on a "casual rumor" or "an accusation based merely on an individual's general reputation" does not exist in this case, since both informants stated they were relying on personal knowledge. In *Spinelli*, the Supreme Court indicated the type of information of which they were speaking, by referring to *Draper v. United States*, 358 U.S. 307 (1959) as a "suitable bench mark." The situation in the present case is not unlike that in *Draper*. In that case, the F.B.I. informer, while not stating the way in which he obtained his information, reported that Draper would return from Chicago on a certain train, dressed in certain clothes, and walking in a particular manner. It will be noted that none of these factors are in themselves incriminating. In the case at bar, one of the informers stated that the defendant was going to move the bookmaking operation to Maryland, and this fact was later verified by the F.B.I.

In addition, there is other corroboration in the present case. The information obtained from one of the informers was corroborated by that given by the other. The movements of the defendant as set forth in the affidavit, while insufficient in themselves to support a finding of probable cause, provide some additional corroboration. While these movements may have no significance to an ordinary citizen, they took on a different meaning to the special agents of the F.B.I., who have training and experience which they apply to their investigations.

The court is of the opinion, for the reasons stated above, that the affidavit in this case fully meets both of the tests set forth in *Aguilar*, *supra*, and that the warrant was based on a legally sufficient showing of probable cause.

Accordingly, it is by the Court, this 12th day of December, 1969,

ORDERED, that the defendant's motion to suppress be, and the same hereby is, denied.

/s/ Leonard P. Walsh, Judge

Copies to:

United States Attorney's Office
Washington, D. C. 20001

H. Clifford Allder, Esq.
666 - 11th Street, N.W.
Washington, D. C. 20001

[Filed Dec. 15 1969]
Robert M. Stearns, Clerk

[Excerpts From Transcript of Proceedings]

Transcript, Page 19

* * *

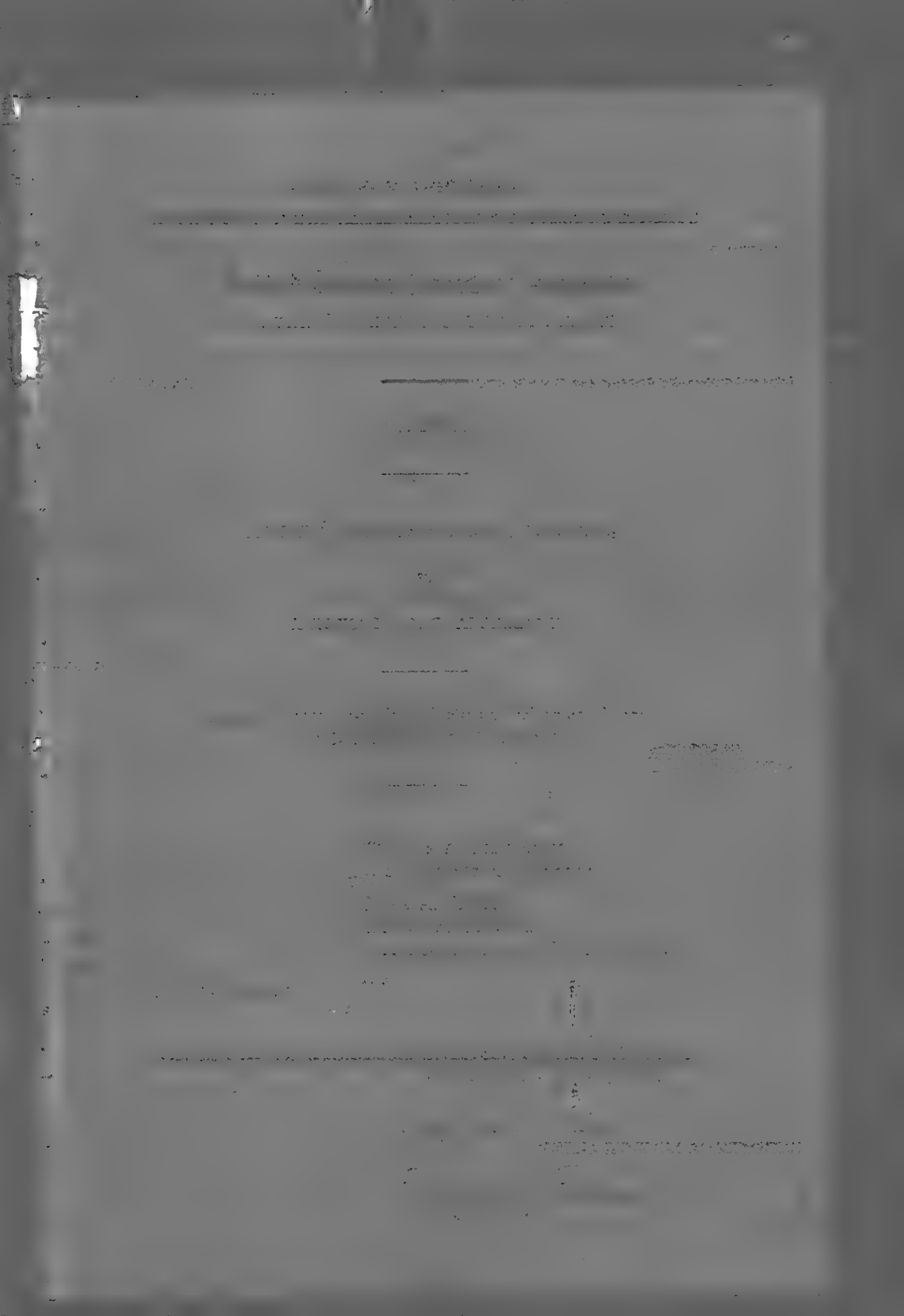
"THE COURT: All right. The Court would like to have a short period of time to look into the matter and the Court will advise you in a short memorandum so far as the motion to suppress 's concerned, and it should be sometime this week. Is this case set 'or trial?

MR. ALLDER: This is the trial, Your Honor.

THE COURT: I see. That is what you said. You are going to rely on the motion.

MR. ALLDER: Yes, your Honor. The only defense we have is a legal defense."

* * *



INDEX

TABLE OF CASES

OTHER REFERENCES

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* Cases chiefly relied upon are marked by asterisks.

ISSUE PRESENTED *

In the opinion of appellee, the following issue is presented:

Whether the District Court erred in finding that the affidavit in support of a search warrant set forth sufficient information to constitute probable cause?

* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,097

UNITED STATES OF AMERICA, APPELLEE

v.

LYNWOOD LONG, APPELLANT

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On October 17, 1969, appellant was charged in a four-count indictment with interstate travel in aid of racketeering enterprises, operation of a lottery, possession of numbers slips and maintaining gambling premises, in violation of 18 U. S. Code § 1952 and 22 D. C. Code §§ 1501, 1502 and 1505, respectively. On November 13, 1969, appellant filed a motion to suppress evidence seized on September 12, 1969, as the result of the execution of a search warrant by an F.B.I. agent in Apartment 1604 at 2338 Twenty-fourth Street, Southeast. When the case came on for trial before Judge Leonard Walsh on December 2, 1969, appellant waived jury trial and entered into a stipulation with the Government that his only defense to the indictment was the alleged inadmissibility of evidence seized as a result of the September 12 search. It was

further stipulated that if the District Court denied his motion to suppress, appellant would be found guilty (Tr. 19; Brief for Appellant, p. 5). After hearing argument, Judge Walsh denied the motion in a memorandum and order filed December 15, 1969. Appellant was subsequently found guilty of all counts of the indictment on December 19, 1969. He was sentenced on February 27, 1970, to eighteen to fifty-four months on count one, one to three years on count two, and one year each on counts three and four, the sentences to run concurrently. It is from those convictions and sentences that this appeal was noted.

With the exception of matters entered into by stipulation, the contents of the affidavit in support of the search warrant for Apartment 1604, 2338 Twenty-fourth Street, S.E., constituted the entire factual presentation before the District Court.

The affidavit, sworn to by Agent Bernard DeSantis of the F.B.I. (and set out in its entirety in the Appendix of the Brief for Appellant), averred the following: On August 6, 1969, information had been received from a confidential informant that appellant was conducting a numbers operation in Apartment 1604 at 2338 Twenty-fourth Street, S.E., the residence of one Russ Cecchini, a man convicted less than a year earlier of maintaining gambling premises and possession of numbers slips. This informant had proven reliable in the past, and specific information furnished by him three years earlier with reference to appellant's involvement in gambling activities was subsequently verified by an F.B.I. investigation. Additionally, the informant had furnished verified information that had resulted in arrests in other cases. The affidavit also stated that the informant's information as to appellant's operation was based on the informant's personal knowledge. The affidavit indicated that on September 9, 1969, another informant, whose numerous tips on previous occasions had also proven to be reliable, stated that he had personal knowledge that appellant was currently working in a numbers office, the address of which the informant did not know.

The affidavit went on to recite ten occasions between August 26 and September 10, 1969, when F.B.I. agents observed appellant's car parked at or near 2338 Twenty-fourth Street, S.E., between 11:15 a.m. and 7:10 p.m. On three occasions appellant was observed to enter the building between 11 a.m. and noon; on two of these he was observed to look around in various directions before entering "to see if anyone was watching him," and on one of these two occasions he was apparently followed and seen to enter Apartment 1604. Appellant was also twice observed to leave 2338 Twenty-fourth Street, S.E. shortly after 7 p.m.

The affidavit concluded by emphasizing that in combination with the reliability of the information received and the observations made, the time of day at which appellant was observed to enter and leave 2338 Twenty-fourth Street, S.E., and the training and knowledge of the observing agents as to the "methods employed by persons engaged in a numbers operation" cumulated to imbue Agent DeSantis with the "firm belief" that appellant was actively engaged in conducting a numbers operation in Apartment 1604 at that address. A search warrant was therefore requested and issued for the apartment and was executed on September 12, 1969, two days after the last observation of appellant. During the search a large amount of gambling paraphernalia was seized, and it was this evidence which Judge Walsh declined to suppress and which constituted the basis for appellant's conviction.

ARGUMENT

The District Court properly denied appellant's motion to supress evidence seized during the execution of the search warrant, inasmuch as the affidavit in support of the warrant set forth sufficient information to constitute probable cause to search the premises.

Appellant contends that the District Court should have granted his motion to suppress. The affidavit in support of the search warrant, he says, failed to comply with the

standards set out by the Supreme Court in *Spinelli* v. *United States*, 393 U.S. 410 (1969), and *Aguilar* v. *Texas*, 378 U.S. 108 (1964), for probable cause grounded upon an informant's tip, since it neither sufficiently "stated the underlying circumstances upon which the informant based his conclusions," nor did it sufficiently describe the accused's criminal activity. See Brief for Appellant, pp. 6-12.

An analysis of the constitutional sufficiency of a search warrant's averment of probable cause appropriately begins with a reaffirmation of the rule that "the informed and deliberate determinations of magistrates empowered to issue warrants are to be preferred over the hurried action of officers who may happen to make arrests." *United States* v. *Lefkowitz*, 285 U.S. 452, 464 (1932). As the Supreme Court observed in *Aguilar*,

> The reasons for this rule go to the foundations of the Fourth Amendment. A contrary rule "that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers." [Citation omitted.] Under such a rule "resort to [warrants] would ultimately be discouraged." [Citation omitted.] Thus, when a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing courts will accept evidence of a less "judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant." 378 U.S. at 110-111.

This principle was again confirmed by the Court in *United States* v. *Ventresca*, 380 U.S. 102, 105-106 (1965). It is a rule that was faithfully complied with by Agent DeSantis in the case at bar, and it is against this standard, rather than a conceivably more restrictive one,[1] that the

[1] In *Draper* v. *United States*, 358 U.S. 307 (1959), cited by appellant as an example of the kind of particularity of detailed de-

sufficiency of probable cause for the search conducted by him should be measured.

While a reviewing court should thus pay "substantial deference" to a magistrate's finding of probable cause, it must nevertheless perform a "neutral and detached" function and "not serve merely as a rubber stamp for the police." *Aguilar* v. *Texas*, *supra*, 378 U.S. at 111. In finding that a magistrate had erroneously performed that function in *Aguilar*, the Court invalidated a search and resulting arrest grounded upon information from an informant, where the warrant authorizing the search set forth neither specific instances attesting to the informant's previous reliability nor any indication of the basis of the informant's tip.

> The affidavit here not only "contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein," *it does not even contain an "affirmative allegation" that the affiant's unidentified source "spoke with personal knowledge."* 378 U.S. at 113 (emphasis added).

In upholding the sufficiency of a search warrant affidavit one year after *Aguilar*, the Court rejected a contention that an affidavit failed to disclose how investigators obtained their information, noting that the affiant had sworn under oath that relevant information in the affidavit was based in part upon "observations made by me" and *"upon personal knowledge."* *United States* v. *Ventresca*, *supra*, 380 U.S. at 110 (emphasis added).

Five years after *Aguilar*, the Court held in *Spinelli* that where an informant's tip fails to meet the two-pronged requirement of *Aguilar*, probable cause might nevertheless be found where sufficient independent sources corroborate the tip to make it as trustworthy as a tip

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scription in an informant's tip which is required by the Fourth Amendment and which (he contends) is lacking here, it is significant that not only did the informer in *Draper* fail to state the way in which he had obtained his information, but Draper's arrest was made without a warrant, and was thus subject to stricter scrutiny than if a warrant had first been obtained.

which, without such independent corroboration, would satisfy the *Aguilar* standards. *Spinelli* v. *United States*, *supra*, 393 U.S. at 415. However, the affidavit supporting the issuance of the warrant in *Spinelli* contained neither indicia of the reliability of the informant whose tip was the basis of the affidavit nor any indication as to the source of his information. Absent any such substantiation, the Court held that the tip, standing alone, was insufficient to provide a basis for probable cause, and that observations by F.B.I. agents of activity by Spinelli similar to that observed by Agent DeSantis in the case at bar were not sufficient, when cumulated with the unsubstantiated informant's tip, to equal probable cause.

The affidavit in support of the search warrant in the case at bar is distinguishable from the affidavits in *Spinelli* and *Aguilar* in a number of critical respects ~~relative~~ relevant to the sufficiency of their respective showings of probable cause.

First, as appellant concedes, there were clear and substantial indicia of the informants' reliability in the affidavit sworn to by Agent DeSantis. See Brief for Appellant, p. 7. Unlike both the *Aguilar* and *Spinelli* affidavits, the affidavit here noted that there were specific, verified instances where on prior occasions the informants had given the F.B.I. information relating to gambling activities, some of which had resulted in arrests. Moreover, one of the informants had supplied verified information three years earlier with reference to *appellant's* involvement in such activities. Thus, the first prong of the *Aguilar* test that was met in neither *Aguilar* nor *Spinelli* was manifestly satisfied here: the affidavit extensively set forth information demonstrating the informant's reliability.

Second, the affidavit in this case, unlike those in *Spinelli* and *Aguilar*, set forth the basis upon which the informants supplied their information: each had indicated he had "personal knowledge" that the appellant was engaging in the activities about which information was supplied.

Appellant contends that the "mere addition" of the phrase "personal knowledge" does not "cure the inherent defects in this affidavit caused by the failure to tell the magistrate how the FBI's source received his information." Brief for Appellant, p. 8. More is required, he contends:

> What is the *source* of that knowledge? Did the informant personally place a bet? Did he actually see the handbook operation? What are the facts, the Court is asking, upon which you base your personal knowledge? *Id.*

Appellant's formulation of the second prong of the *Aguilar* test is articulated with the kind of appealing simplicity that disguises its inadequacy in analyzing the sufficiency of the affidavit in the case at bar. The Supreme Court might well have been concerned with answers to the questions posited by appellant. But the Court has also repeatedly taken cognizance of the Government's legitimate need to protect the identity of informants from disclosure, *McCray* v. *Illinois*, 386 U.S. 300 (1967), *Rugendorf* v. *United States*, 376 U.S. 528 (1964), and the paramount status of that need, where the only balancing interest asserted in favor of revelation of the informant's identity is a factual situation analogous to that here, is unquestioned. *United States* v. *Harrison*, D.C. Cir. No. 22,415, decided July 15, 1970, slip op. at 3; *Anderson* v. *United States*, 106 U.S. App. D.C. 340, 341, 273 F.2d 75, 76 (1959).

To argue, then, as appellant implicitly does, that in drafting an affidavit law enforcement officers have an obligation not only to state the source of their informer's information (*e.g.*, personal knowledge), but to detail as precisely as possible the *basis* of that source, apparently without regard to the possibility that it might possibly result in disclosure of an informant's identity, is to go beyond the requirements of *Aguilar*, *Ventresca* and *Spinelli* and to emasculate the protections against disclosure of informants' identities repeatedly recognized by both this Court and the Supreme Court.

The affidavit in this case indicated that both informants had "personal knowledge" of appellant's involvement in gambling activities; this is language which the Supreme Court has twice repeated as indicative of the kind of information which *should* appropriately be set forth in affidavits if the inadequacies of *Aguilar*- and *Spinelli*-type affidavits are to be avoided. *Aguilar* v. *Texas*, *supra*, 378 U.S. at 113; *United States* v. *Ventresca*, *supra*, 380 U.S. at 110. However, courts should not nitpick in construing the sufficiency of affidavits.

> If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts towards warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting. *United States* v. *Ventresca*, *supra*, 380 U.S. at 108.

The admonition of the Supreme Court in *Ventresca* seems particularly apt here where the indictment, whose allegations were in effect conceded as being true by appellant below, charges offenses which strongly suggest involvement by appellant in organized criminal activity. Under such circumstances language which at once affirmatively indicates that the informant's tip was not the product of rumor or hearsay, and which nevertheless guards against the enhanced susceptibility of the informant's identity to discovery (as well as the enhanced risks such discovery would likely entail), should receive the approbation of this Court.

Even assuming *arguendo* that the affidavit in support of the search of Apartment 1604 fell short of complying with *Aguilar's* second requirement, we submit that suffi-

cient independent sources exist corroborating the informants' tips to make them as trustworthy as tips meeting the *Aguilar standards*. *Spinelli* v. *United States*, *supra*, 393 U.S. at 415. Agent DeSantis knew that the man whose apartment was to be the subject of the search had been previously convicted of gambling offenses less than a year earlier, and he also knew, on the basis of F.B.I.-verified information from one of his two informants, that appellant himself had previously been engaged in gambling activity. The agents had observed activity of appellant which, while essentially similar to that observed in *Spinelli*, was more strongly suggestive of possibly illegal behavior, in that appellant, upon entering 2338 Twenty-fourth Street, S.E., was twice observed to look around to see if he was being watched. The information received by Agent DeSantis came not from a single informant, but from two different ones ,each of whom had a previous record for reliability. Thus the magistrate was not compelled to look solely to the reliability and sources of information of the two informants to corroborate their tips; the informants corroborated each other. Finally, the magistrate also had before him the averred knowledge and training of Agent DeSantis and the other F.B.I. agents involved in the surveillance of 2338 Twenty-fourth Street, S.E.[2] Their observations of appellant entering and leaving the apartment building at similar times each day would, if standing alone (as they did in *Spinelli*), hardly have been suggestive of criminal activity; but when cumulated together with the agents' knowl-

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[2] This Court has had occasion in a somewhat different context to affirm that the personal knowledge and experience of law enforcement officers is an appropriate factor to be considered in determining the existence of probable cause to arrest.

> The test of probable cause is not what reaction victims—or judges—might have but what the totality of the circumstances means to police officers. Conduct innocent in the eyes of the untrained may carry entirely different "messages" to the experienced or trained observer. *Davis* v. *United States*, 133 U.S. App. D.C. 172, 174, 409 F.2d 458, 459-460, *cert. denied*, 395 U.S. 949 (1969). See also *Jackson* v. *United States*, 112 U.S. App. D.C. 260, 262, 302 F.2d 194, 196 (1962).

edge and training in the ways of gamblers, the tips from two informants independently corroborating each other, the proven reliability of the informants in the past, the recent gambling convictions of the tenant of Apartment 1604, the previous gambling activity of appellant indicated by one informant and confirmed by an F.B.I. investigation, and appellant's own apparent uneasiness that he might be being watched as he entered 2338 Twenty-fourth Street, S.E., the observations of appellant by the agents had far more sinister implications than the similar observations in *Spinelli*.

Under the standards of either *Aguilar* or *Spinelli*, then, we submit that the affidavit in support of the search warrant for Apartment 1604 set forth more than sufficient information to constitute probable cause to search the premises. Even if the question were a close one, however, which we by no means concede, it should at least be resolved, as should all "doubtful or marginal cases in this area," by the "preference to be accorded warrants." *United States* v. *Ventresca*, *supra*, 380 U.S. at 109.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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JOHN A. TERRY,
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Assistant United States Attorneys.

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